for the petitioner to saddle himself with a calculation of what the chose in action is worth at the time of the affirming of the estate duty affidavit.

Consequently I would answer the questions of law posed by the petitioner as follows. Whilst security and sureties to the administration bond can legally be required in all cases where the only asset of a deceased's estate is a chose in action, the actual requirement of such security or surety can be decided only upon the facts of each particular case. I would further state that the minimum fee has to be paid for extracting letters of administration in all such cases. It stands to reason that the petitioner would not go to the trouble of taking out letters if the chose in action did not have some value. The proper fee payable can be taken when the true value of the asset has been ascertained.

This application was brought for the benefit of the estate. Accordingly I order that the costs of and incidental to the application be paid out of the estate.

I would put on record the debt of this court to Mr Ong Chee Yong for the obvious trouble he has taken in this matter

Order accordingly.

Solicitors: *Lee & Cheah.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Shaaban bin Abdul Rahman

HIGH COURT (ALOR SETAR) – KEDAH CRIMINAL TRIAL NO 58-03-87
KC VOHRAH J
28 JANUARY 1989

Criminal Law – Dangerous drugs – Trafficking in – Discrepancies in evidence presented by prosecution – Discrepancies minor – Whether defence's story sufficient to rebut prosecution's case – Dangerous Drugs Act 1952, s 39B(1)(a) & (2)

The accused was charged with trafficking in dangerous drugs, ie 409.7 gm of cannabis. According to three police eye witnesses, PW3, PW4 and PW5, the accused and another were spotted at about 3.00 am on 25 December 1986 about to cross a highway. On seeing PW4 and PW5, the accused and his companion ran into Jalan Mahkota which abutted the highway. PW3 and PW4 gave evidence that the accused threw the package he was carrying. The accused was arrested by PW4 but his companion escaped. The package was recovered and found to contain cannabis.

Held, convicting the accused:

Although the evidence given by PW3, PW4 and PW5 had some discrepancies, they had no reason to lie and these discrepancies were minor and did not detract from the clear evidence showing that the accused carried a bag, that he ran and that he threw it before his arrest.

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(a), 37(da)(vi), 39B(1)(a), (2)

Mohamed Saman bin Mohd Ramli for the Public Prosecutor.

Naughton Christie for the accused.

Cur Adv Vult

KC Vohrah J: The charge against the accused reads as follows:

> That you on the 25th day of December, 1986 at about 3.00 am at the junction of Jalan Mahkota with Lebuhraya Darulaman, Alor Setar, in the District of Kota Setar, in the State of Kedah, did traffic in on your own behalf dangerous drugs to wit, 409.7 gm of cannabis, and that you have thereby contravened s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the same Act as amended by Act A553/83.

The case for the prosecution is that three police eye-witnessess, PW3, PW4 and PW5 at 3.00 am on 25 December 1986 spotted two persons, the accused and another male, about to cross a highway. The accused was seen to have a package with him. On their seeing two of the eye-witnessess, PW4 and PW5, who were then riding a motorcycle, the accused and his companion turned around and ran into Jalan Mahkota which abutted on to the highway. PW3, then in a car, and PW4 saw the accused throw the package he was carrying to his right near a 'Stop' sign post. PW3 saw it land in a drain by the side of the sign post. PW4 and PW5 gave chase to the two men and the accused was then arrested by PW4 whilst the companion of the accused escaped although pursued by PW5. PW3 recovered the package and found it to contain dried leaves which, on analysis by a government chemist, PW1, were found to be 409.7 gm of cannabis.

The evidence of Inspector Hasnan, PW3, was that he and two police personnel were proceeding in his car in the direction of Anak Bukit along Lebuhraya Darulaman, which was a dual carriageway. Two other police personnel, PW4 (Detective Constable Tara Singh) and PW5 (Detective Ong Ah Tee) were on a motorcycle riding along the same carriageway in the same direction. This was at about 3.00 am on 25 December 1986 in the vicinity of Taman Merdeka and near a Caltex petrol station. PW3 then saw ahead of him on the other carriageway (for traffic going in the direction of Alor Setar), at the junction between that carriageway and Jalan Mahkota, two male persons. One was wearing a red tee-shirt and he was carrying a black-coloured package. The other man, slightly behind the man in red tee-shirt, was wearing a blue tee-shirt and he was empty-handed.

In front of the junction was a break in the divider separating the two carriageways. PW3 saw the two males about to cross the road from the junction of the highway and Jalan Mahkota. He also saw PW4 and PW5 ahead of him on their motorcycle at the break of the divider where Detective Constable Tara Singh (PW4) stopped his motorcycle. At that moment PW3 saw the two men turning around and run into Jalan Mahkota. He also saw the man in the red tee-shirt throw the package he was carrying to his (the man's) right into a drain just by the side of a 'Stop' sign which was placed near the junction. PW3 noticed Tara Singh (PW4) and Ong Ah Tee (PW5) giving chase to the two persons. PW3 parked his car and he and the two personnel in his car pursued the two men.

PW3 said that he then saw PW4 apprehend the man in the red tee-shirt and he identified that man as the accused. He saw Ong and the rest of the police party chase the man in the blue tee-shirt but that man managed to escape. PW3 then went to the place where he saw the accused throw the package. He recovered the package from a drain near the 'Stop' sign post and the contents of the package were wet. According to PW3 dried leaves were found in the package.

As regards the evidence of PW3 (Inspector Hasnan) that he saw two men, one wearing a red tee-shirt and carrying a black package and the other wearing a blue tee-shirt, empty handed, this was confirmed by the evidence of Detective Constables Tara Singh (PW4) and Ong Ah Tee (PW5). Both confirmed they were riding a motor cycle with Ong Ah Tee as pillion rider in the direction of Anak Bukit when they saw the two men on the other side of the highway about to cross the road. One man was wearing a red tee-shirt and he carried a package in his hand. The other was in a blue tee-shirt and was slightly behind his companion; he was empty-handed.

Tara Singh confirmed he stopped his motorcycle at the break in the central divider of the highway. He said that when the two men saw him stop his motorcycle they doubled back and ran away. Both Tara Singh and Ong Ah Tee confirmed that they pursued the two men. Tara Singh said that when the man in the red tee-shirt doubled back he threw the package which he had with him to his right at the junction where there was a road sign, confirming the evidence of Inspector Hasnan on the matter.

Tara Singh confirmed that he apprehended the man in the red tee-shirt, the accused. He also said that after he had arrested the accused, on the instruction of Inspector Hasnan, he handcuffed the accused and brought him to the spot where the accused was seen to throw the package. This was near the road sign and Inspector Hasnan retrieved the package. He said that the package was on the grass, contradicting Inspector Hasnan who said it was in the drain by the side of the road sign. I shall deal with this aspect of the evidence later.

PW5, Ong Ah Tee, confirmed that he, followed by two others, chased the man in the blue tee-shirt to no avail. The accused and the package he threw were brought to the Alor Setar police station and handed over to Inspector Mahadzar (PW6), the investigation officer of the case. PW6 took possession of the red tee-shirt used by the accused and this was produced in court as P11.

I now come back to the package which PW3, PW4 and PW5 said they saw the accused have and which PW3 and PW4 said they saw the accused throw away and which PW3 retrieved. The package, according to PW3, contained dried leaves compressed into a block and he suspected the substance to be cannabis. This substance was wrapped in a piece of yellow paper (P9) and enclosed in a plastic bag (P7) which in turn was wrapped in a grey tee-shirt (P6). All these were inside a transparent plastic bag (P5) which in turn was enclosed in a black plastic bag (P4). These findings were substantially confirmed by the investigating officer of the case, PW6 who, after receiving the said items from PW3, sent the items in a sealed envelope to a government chemist, Mr Chan Kee Bian, PW1. PW1 also confirmed finding the said items. He analysed the plant material (P9) and found it to be cannabis, 409.7 gm of it.

Defence counsel put to PW3 (Inspector Hasnan) that the accused was on the other side of the highway (ie the side opposite Jalan Mahkota and along the carriageway leading to Anak Bukit) when he was arrested, that he was alone, that he did not run, that he did not have nor did he throw a black-coloured package. PW3 denied the allegations. He agreed, though, that the accused did not offer any resistance to the arrest.

It was suggested to PW4 (Tara Singh) that he did not see the accused with a package, and that when the other person ran away he (PW4) cried out, 'Chase him. He has the barang'. PW4 denied the allegations. He also denied that he did not take the accused to the place where the package was allegedly thrown. He agreed, however, that the accused did not offer any resistance to his arrest.

PW5 (Ong Ah Tee) under cross-examination said he could not remember the colour of the package as he did not pay attention to the colour; he said that when he saw the two men run he started to chase the man in the blue tee-shirt while PW3 chased the accused. He said that the man in the blue tee-shirt ran faster and faced with the situation that the accused had been arrested by PW3 he (PW4) chased the other man. He denied the allegation that the accused did not carry the package and that it was the other man who disposed of it.

At the close of the case for the prosecution there were primary facts, not inherently improbable which showed, on a prima facie basis, that the accused at the time, date and place as stated in the charge was in possession of 409.7 gm of cannabis, a dangerous drug within the meaning of s 2 of the Dangerous Drugs Act 1952.

All the eye-witnesses, Inspector Hasnan and Constables Tara Singh and Ong Ah Tee, saw the accused with a package and Hasnan and Tara Singh saw him throw it. Though Tara Singh did say it was recovered from the grass, the evidence of Hasnan was clear, that it was recovered from a drain by the side of a sign post. Bearing in mind the evidence of Hasnan that the contents were wet, and the evidence of the investigating officer, PW6, that the plant material in the package was damp when he received it and the evidence of the chemist, PW1, that the plant material was damp and that he had to dry it, it seems clear that the package was recovered from the drain as was stated by Hasnan and that Tara Singh was mistaken when he said that the package was recovered from the grass.

The fact of possession of the package containing the cannabis having been established against the accused, on a prima facie basis he is presumed to have known its nature, ie that it was cannabis, and the amount of cannabis being 409.7 gm he is presumed to have trafficked in it, the presumptions in s 37(a) and s 37(da)(vi) respectively of the Act being applicable.

Defence

The accused elected to give his evidence on oath. While admitting his presence at the scene he denied carrying or throwing away the package of drugs. His defence was that one Joe carried the package, the contents of which the accused did not know, and that Joe threw away the package when the police chased them.

He gave an elaborate background story stretching from 21 December 1986 to 25 December 1986 as to the events leading to his being at the scene on 25 December 1986 (at about 3.00 am)

Let me deal, however, first, with the events of 24 and 25 December 1986. He stated that on 24 December 1986 Joe, who had been introduced to him by one Man Tok Ngai ('Man') on 21 December 1986 met him by chance and requested the accused to accompany him and another person to Kangar in a car in order to look for Joe's towkay who could hire the accused's lorry. He agreed to do so as Joe also had told him that the person who was going to drive the car had no driving licence and in the event of a police road block on the way he (the accused) could take over the wheel. He subsequently found out that the driver was Man. He stated that he had met Man on 21 December 1986 after the latter had, over the phone, requested him to come to Pekan Rabu, Alor Setar from Pendang (where the accused lived) as Man wanted to hire the accused's lorry. It turned out that it was a towkay who would hire the lorry but the towkay not being found at his kongsi and the accused being unhappy over an argument with his wife in Pendang, the accused stayed in Alor Setar from 21 December 1986 until the evening of 24 December 1986 when he chanced upon Joe who made the request that he accompany him and another to Kangar.

According to the accused the three of them, with him in the back seat, proceeded in the direction of Kangar that evening but they never went to Kangar. Instead they went into a road at a junction which led to Sanglang and they reached a railway crossing gate where Man and Joe left the accused and asked him to wait. The latter two returned at 10.30 pm after a long while and the accused was angry but he said he could not remember if he said anything to them. They did not proceed to Kangar but instead proceeded in the direction of Alor Setar where, before a police road block, the accused took over the wheel from Man. On reaching Jalan Sungai Besar they stopped for a drink after which Man drove off in the car and Joe and the accused had to wait for a long time before he returned. Then Man drove them towards Alor Setar.

The accused stated that Man proceeded along Jalan Anak Bukit and he stopped his car at a junction in front of a Caltex petrol station. According to him Joe then said that he had some work to do at the kongsi behind the Caltex station. This was the kongsi that Man and Joe had brought the accused to on 21 December 1986 to look for the towkay who was to hire the accused's lorry.

Man then drove away, leaving the accused and Joe at the junction; and the accused identified the junction shown in P10C as the junction (the junction between Jalan Mahkota and Lebuhraya Darulaman). The accused said that Joe then crossed the road (Jalan Mahkota) probably to ease himself and when he came back he requested the accused to go with him to the kongsi, telling him that he had some work to do there. As they were walking towards the gap in the divider in order to cross to the other side of the highway, the accused who was walking ahead of Joe, saw a motorcycle with people in plain clothes. He said that he was not alarmed but that Joe turned back and ran. The accused stated that he was surprised and shocked and he also ran in the same direction. He heard someone say, 'Chase the man with the bag'. He said that Joe had brought a bag with him when he alighted from the car and he saw Joe throw this bag to his right when running. He had asked Joe about this bag but Joe told him it was not necessary for him to know and that he would know later and he should not interfere. Joe then disappeared into the road shown in P10C (Jalan Mahkota). The accused stated he then stopped running

after which he was arrested. He admitted he was wearing a red tee-shirt and identified it as P11. He said that Joe was wearing a dark coloured tee-shirt and that it was not blue in colour as was claimed by the prosecution witnesses.

The denial by the accused that he had the package of drugs and that he threw it away flies in the face of the positive evidence of Inspector Hasnan, Constables Tara Singh and Ong Ah Tee who saw the accused have the package. They saw a man in a red tee-shirt carrying a package. The accused admitted he wore a red tee-shirt that night and he indeed identified the red tee-shirt, taken possession of by the investigation officer of the case from him and which was produced in court (P11) as the one he wore. The three police eye-witnessess were clear in their evidence and positive that the person in the red tee-shirt was the one who carried the package of cannabis.

It was suggested that the witnesses could have made a mistake about the identity of the person who carried the package of drugs as it could have been difficult to distinguish the colour of the tee-shirt worn by the accused and the colour of the tee-shirt which the other person wore under the artificial lighting of the street lights. According to the accused his companion wore a tee-shirt which was dark-coloured but not blue. But none of the eye-witnesses were questioned on the matter. All three – Hasnan, Tara Singh and Ong – were positive that the man who carried the bag was wearing a red tee-shirt while his companion wore a blue tee-shirt and they were not cross-examined on this aspect of the evidence. In any event Hasnan had an uninterrupted view of the man in the red tee-shirt from the time he was spotted with the bag till the time he threw the bag. After he had parked his car he saw that Tara Singh had arrested the same man, the man in the red tee-shirt, and he identified him as the accused. Tara Singh also had an uninterrupted view of the man in the red tee-shirt from the time of his first spotting to the time of his arrest; Tara Singh was the one who chased him, saw him throw the bag and effected his arrest. And the man in red was the accused. And all three eye-witnesses testified to the fact of the escape of the man in blue.

I can see no reason for any of the three police eye-witnesses to tell lies. They gave their evidence in a clear straightforward way. Discrepancies there were – for example, as to whether the man in the red tee-shirt and his companion were spotted when they were crossing or about to cross the road and as to where the bag was recovered – but these are discrepancies which are minor and they do not detract from the clear evidence showing that the accused carried a bag, that he ran and that he threw it before his arrest. It was stressed that the accused offered no resistance and this was not disputed by the prosecution that he offered no resistance to the arrest but the point is that Tara Singh had already caught up with him and evidence of no resistance is neither here nor there. There is nothing in the evidence of the accused that creates a reasonable doubt on the prosecution's case that he was in possession of a bag of cannabis weighing 409.7 gm of cannabis.

In so coming to that finding I have considered the totality of the evidence adduced in this case including the accused's elaborate story of the events which led to his being present at the scene that fateful day. In my view his story was meant to shift blame on to Joe and Man and to portray himself as an innocent victim of circumstances. But the facts adduced by the prosecution show that he was clearly in possession of the bag of drugs. He certainly was not an innocent victim caught unwittingly in a criminal endeavour of Joe and Man.

It is hard to believe that Joe who was a mere acquaintance would chance on him and tell him of an already formulated idea to go to Kangar that evening, the evening of 24 December 1986, in order to meet with Joe's towkay so that the towkay could hire the accused's lorry. The accused had parted with Joe on the morning of 22 December 1986 after spending a night at the kongsi where they had failed to meet the said towkay and the accused, on his own admission, stated that he did not have any further discussion about the hire of the lorry with Joe. Nor did he meet Man; after the meeting with Man, who went with them to the kongsi on 21 December 1986, he did not meet with him until the 24th evening. The accused explained his unusual presence in Alor Setar even after the failure to get his lorry hired. He said that after the failure to hire out his lorry he did not go home to Pendang, merely 16 miles away from Alor Star. Instead he wandered about town. He was upset as he had had a quarrel with his wife before coming to Alor Setar and he did not want his wife to jibe at him for his failure to hire out the lorry. He decided not to go home after failing to find Man on 22 December 1986. But clearly Man and Joe were not aware of this, that he had decided not to go back. How was it that when Joe met him by chance on 24 December 1986 Joe had an already formulated scheme to present to him to have him in the car and to help the accused find the towkay in Kangar to hire his lorry? The accused clearly stated said it was a chance meeting between him and Joe; to my mind the story is highly improbable.

Perhaps the accused intended the court to believe that it was Joe's and Man's ploy to induce the accused to go with them in the car as they needed a licenced driver for their nefarious activities and the two, unknown to the accused, did not intend to go to Kangar. According to the accused, Joe told him that his friend (who, according to the accused, turned out to be Man) did not have a

licence to drive and he needed the accused to take over the wheel in case of police road blocks. The question is – why would Joe and Man, who it is clearly implied were criminally involved in the trafficking of the cannabis in the bag, at the spur of the moment, if the meeting Joe and the accused was by chance as stated by the accused, risk taking the accused, a mere acquaintance, for a dangerous operation of presumably taking drugs either from near Sanglang or Sungai Baru? These were places where the accused claimed they went to; near a railway crossing near Sanglang the two disappearing in the car leaving him there for a long while; at Sungai Baru Man taking off in the car and not coming back until much later. Did the accused intend otherwise to suggest Joe and Man knew he was still in Alor Setar? But his evidence was that before 25 December he did not meet Joe after 22 December and he did not meet Man after 21 December and it is clear he did not tell them he was staying in Alor Setar. I find the story as also highly improbable. My view is that nothing in his elaborate background story detracts from the clear evidence of the prosecution that he was in possession of the bag of cannabis, not his companion, whatever may be that man's name.

As to the nature of the drugs the accused has not rebutted on a balance of probabilities the presumption that he knew the drugs were cannabis. He ran away when he saw the police and he threw away the bag containing the drugs.

As for the presumption of trafficking there was nothing in the evidence which, on a balance of probabilities, rebutted the presumption that he was trafficking in the 409.7 gm of cannabis as specified in the charge.

I accordingly find him guilty on the charge and I convict him.

Order accordingly.

Solicitors: *Naughton Christie & Co.*

Reported by *Yap Shao Sin*

Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor

HIGH COURT (PENANG) – SUIT NO 22-152-1988
MOHAMED DZAIDDIN J
9 JANUARY 1989

Civil Procedure – Writ filed against defendant whilst appeal under Commodities Trading Act was pending – Failure of plaintiff to exhaust right under Act – Decision under Act final – Whether plaintiff can proceed with action – Commodities Trading Act 1985, s 46

Civil Procedure – Complaint lodged against defendant under Commodities Trading Act – Enquiry conducted and plaintiff awarded compensation by Commission – Plaintiff dissatisfied with quantum awarded – Writ filed against defendant – Relitigation of identical issues – Whether an abuse of the process of court

Civil Procedure – Conditional appearance filed out of time – Failure to file defence – Short service of defendant's application – Whether these were mere technicalities curable under O 2 r 1 and O 3 r 5 of the Rules of the High Court 1980

The plaintiff was a client and customer of the first defendant in some commodities futures trading transactions. She entered into various transactions with the first defendant and paid substantial sums of money. Later, she discovered that she had been taken for a ride in these transactions by the first defendant and a complaint was lodged with the Commodities Trading Commissioner. An enquiry into her complaint was conducted and the plaintiff was awarded compensation in the sum of $58,728 to be paid from the statutory deposit kept by the second defendant. She was dissatisfied with the quantum awarded and appealed to the Commission, claiming that as she had paid the first defendant an equivalent sum of 5,872,800 Japanese yen she should be compensated the said amount at the current exchange rate, which was $125,149.36. In the meantime, the plaintiff filed a writ against the second defendant for an order that the latter pays her the sum of $125,149.36 from the statutory deposit of the first defendant which is held by the second defendant under the Commodities Trading Act 1985 ('the Act'). The second defendant then applied to the court to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980. In addition, the plaintiff also applied for an interim injunction against the second defendant restraining the latter from releasing the sum of $125,149.36 from the statutory deposit pending the final disposal of the suit or until further order.

At the outset of the hearing of these applications, the plaintiff raised three preliminary objections against the second defendant's application stating that (a) the conditional appearance of the second defendant to her writ was filed out of time in contravention of O 3 r 2 of the Rules of the High Court 1980; (b) the second defendant failed to file his defence in time which entitled her to a judgment in default under O 19 r 2; (c) there was short service of the second defendant's application. On these grounds, the plaintiff claimed that the second defendant should be precluded from defending the claim and judgment be entered against him.

Held, allowing the second defendant's application and dismissing the plaintiff's application:

(1) The preliminary objections raised were mere technicalities curable under O 2 r 1 and O 3 r 5 of the Rules of the High